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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROY TONY TORRES, Defendant and Appellant.	B147373 (Super. Ct. No. BA204156)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Daniel Rogers and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

Roy Tony Torres appeals from the judgment entered following his conviction by jury of one count of stalking (Pen. Code, § 646.9, subd. (a)). He was sentenced to three years of probation. He appeals, contending the trial court erred in excluding certain evidence, that he received ineffective assistance of counsel when his trial attorney failed to request that the jury be instructed with CALJIC No. 2.21.2, and that the trial court erred in instructing the jury with CALJIC No. 17.41.1 We find each of these contentions to be without merit and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Eddie and Regina Torres were married and lived on Oakford Drive in Los Angeles. Eddie's mother lived across the street with her other son, appellant. At the time that Regina moved into the house, there was an existing restraining order requiring Eddie and appellant to stay away from one another. During September 1998, shortly after Regina and Eddie were married, there were three incidents in which appellant followed Regina in his car after she left the house. As a result, Regina became concerned and asked her husband or her neighbor to walk her to her car and make sure she returned home safely.

In November 1998, appellant followed Regina to the bank. Appellant sat in his car in the bank parking lot, stared at her, and revved the engine of his car as she walked into the bank. When she returned, appellant was gone.

In February 1999, appellant again followed Regina to the bank. A few months later, appellant followed Regina and Eddie when they went to the bank.

Several times thereafter, Regina saw appellant taking pictures of her as she drove home. Appellant also would take photographs of Eddie and yell obscenities at him. Regina reported the picture-taking incidents to the police.

Appellant stopped taking pictures, then about one week later, appellant started yelling at Regina as he stood in the bushes around his house.

In June 2000, Regina and Eddie were driving when they saw appellant stopped at an intersection, heading in the opposite direction. Appellant crossed into their lane and drove directly towards their car, yelling obscenities. Appellant only turned away to avoid a collision. Regina reported the incident to police.

Regina's neighbor, Louie Fernandez, testified that he saw appellant come out of his home and cuss at Regina at least a half dozen times between September 1998 to June 2000. He had also seen appellant cuss and scream at Eddie and take pictures of him. Fernandez was in the car with Eddie when appellant tried to drive into them. They drove to the police station to report the incident and appellant was already there, claiming that he was the one in danger.

Appellant sought to introduce evidence at trial that the reason the initial restraining order was in place was that Eddie had tried to beat him. He argued that this evidence would demonstrate that Eddie was not afraid of appellant, and was actually the aggressor in their relationship. The trial court excluded the evidence on the ground that it was irrelevant.

Appellant called his mother, Cecilia Torres, as his only defense witness. She testified that from July 1998 until June 2000, when appellant was living with her, she never saw him yelling at or threatening Eddie or Regina. Eddie and Regina would often "badmouth" appellant, but Regina never said that appellant was following her.

Appellant sought to question his mother about the incident in April 1998 in which he claimed Eddie beat him, prompting him to seek the first restraining order. The trial court also prohibited this line of questioning on the ground of relevance, but said that it would allow appellant to ask Eddie on cross-examination if he had ever done anything to appellant. If Eddie responded in the

negative, then appellant would be allowed to impeach him with evidence of the April 1998 beating incident. Appellant, however, did not ask Eddie the suggested question on cross-examination.

DISCUSSION

1. *Exclusion of Evidence of Prior Beating Incident*

Appellant contends that the trial court erred in excluding evidence that Eddie had beaten him.

We find no error in the trial court's ruling. It was established several times during the course of the trial that the restraining order at issue was imposed against both Eddie and appellant. In her opening statement, the prosecutor indicated there was a "mutual" restraining order in effect. Defense counsel argued that the victim had been engaging in "annoying violent" and "bizarre" conduct against appellant, that what appellant and his brother "have been doing to each other for years is exactly what is happening right now" and that "it's interchangeable who is the complainer."

On direct examination, Regina Torres testified that she knew the restraining order applied to both Eddie and appellant.

On cross-examination, the defense counsel asked Regina if she knew that Eddie and appellant had a "falling out" before she married Eddie. Regina referred to an incident in 1998 between the two brothers with their mother present, which resulted in the imposition of the mutual restraining order. Regina admitted that appellant had initiated the process by seeking the restraining order first.

Appellant's contention that evidence about the "beating" would have called Eddie's credibility into question is meritless. The majority of the incidents for which appellant was convicted involved Regina, who was not married to Eddie when the alleged beating occurred. In addition, Eddie and Regina's testimony

about appellant's aggressive behavior was confirmed by the testimony of the neighbor, Louie Fernandez. Most importantly, however, the trial court did state that it would permit appellant to ask Eddie about the incident on cross-examination, but appellant declined the opportunity. Appellant cannot therefore complain about the lack of opportunity to present evidence about the beating.

Finally, any error would have been utterly harmless. The jury was apprised sufficiently of the feud between the two brothers and knew that the restraining order applied to both. The specific nature of the incident was irrelevant to the offense of which appellant was convicted, that appellant was stalking Regina.[1]

2. *CALJIC No. 2.21.2*

Appellant's counsel did not request, and the court did not give CALJIC No. 2.21.2 which provides: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

Appellant contends the failure to request this instruction constitutes ineffective assistance of counsel. He argues that Regina and Eddie were not credible witnesses because of inconsistencies in their testimony and because Cecilia Torres contradicted their testimony.

First of all any inconsistencies in the testimony of Regina and Eddie were on minor points. Secondly, their testimony was corroborated by the

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[1] Appellant was also charged with stalking Eddie and thus violating the restraining order, but was found not guilty of that count.

testimony of the neighbor, an apparently neutral witness. Finally, the testimony of Cecilia Torres was not necessarily irreconcilable with their testimony. It is entirely possible that the incidents complained of occurred when she was not home. There was no substantial evidence to support a theory that Eddie was testifying falsely, and thus CALJIC No. 2.21.2 need not have been given. (*People v. Lewis* (1990) 50 Cal.3d 262, 276-277; *People v. Cooks* (1983) 141 Cal.App.3d 224, 331-332.) Accordingly, there is no merit to the claim of ineffective assistance of counsel. (*People v. Ochoa* (1998) 19 Cal.4th 353, 458.) In any event, the jury was given several other instructions on evaluating the credibility of witnesses (CALJIC Nos. 2.20--Believability of Witness, No. 2.21.1--Discrepancies In Testimony, No. 2.22--Weighing Conflicting Testimony, and No. 2.90--Reasonable Doubt), so the court was not required to restate the principles contained in those instructions. (*People v. Frye* (1985) 166 Cal.App.3d 941, 952.)

3. *CALJIC No. 17.41.1*

The court instructed the jury with CALJIC No. 17.41.1, as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Appellant contends the trial court erred in giving this instruction to the jury because it infringed on the power of jury nullification, invaded the secrecy of jury deliberations, intimidated minority jurors and denied appellant the right to a unanimous jury verdict.

We find appellant's related contentions to be meritless for several reasons.[2] First we find that appellant's failure to object to the giving of this instruction at trial constitutes a waiver of his right to object to it on appeal. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193.)

Secondly, we have held in the past that while "[j]uries have had the naked power to 'nullify' for over 300 years," they are not entitled to be invited or encouraged to use it. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1707; *People v. Nichols* (1997) 54 Cal.App.4th 21, 24-26.) Recently, the Supreme Court held in *People v. Williams* (2001) 25 Cal.4th 441, 463: "[j]ury nullification is contrary to our ideal of equal justice for all." Jurors do have a duty to follow the court's instructions and should be informed of that duty. (*Id.* at p. 463; *People v. Daniels* (1991) 52 Cal.3d 815, 865.) Next, we do not find that CALJIC No. 17.41.1 inhibits free and open jury deliberations or coerces juror unanimity, especially in light of the other instructions given (e.g., CALJIC Nos. 1.00 and 17.42).

The record reflects that the case was submitted to the jury at the end of the day on January 12, 2001. After 45 minutes of deliberations, the jury was adjourned and re-commenced deliberations on January 16, 2001, at 9:00 a.m. At 10:30 a.m. they announced that they had reached a verdict. There is no indication at all that any member of the jury was refusing to deliberate or that there was any dispute in reaching the verdict. Therefore, if any error existed in giving CALJIC No. 17.41.1, it was harmless. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.)

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[2] The Supreme Court still has under review several cases which have dealt with this issue, e.g., *People v. Engelman*, No. D032699 (review granted April 26, 2000); *People v. Taylor*, No. S088909 (review granted Aug. 23, 2000).

DISPOSITION

The judgment is affirmed.

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HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.